IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 27TH NOVEMBER 2007 / 6TH AGRAHAYANA 1929

AS.No. 537 OF 2002(F)

OS.713/1994 OF PRINCIPAL SUB COURT,KOLLAM
.....

APPELLANT: PLAINTIFF

KERALA VYAPARI VYAVASAYA EDOPANA
SAMITHI, ANCHALUMMODU UNIT, REPRESENTED BY ITS
PRESIDENT R.RAMACHANDRAN PILLAI, SON OF
R.RAGHAVAN PILLAI, PUTHIYA VEEDU, KOTTAKKAKAM,
PERINAD P.O., KOLLAM.

BY ADV. SRI.P.B.SURESH KUMAR

RESPONDENTS: ADDITIONAL DEFENDANT NO.2

THANKAMMA, CHIRAYIL PUTHEN VEEDU,
MURUNTHAL CHERRY, TRIKKADAVOOR VILLAGE. (DIED)

ADDL. RESPONDENT NO.2:

SHIVA PRASAD,
CHIRAYIL PUTHEN VEEDU,
MURUNTHAL CHERRY,
THRIKKADAVOOR VILLAGE.

(THE SOLE RESPONDENT DIED AND ADDL. SECOND RESPONDENT IMPLEADED AS PER ORDER ON I.A. 37.2007 DATED 10.8.2007)

BY ADV. SRI.K.SUBASH CHANDRA BOSE

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 27/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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A.S. NO. 537/2002

ORDER ON CMP NO. 6623/2002, I.A. NO. 2515/2004 & I.A. NO.3289/2007

// DISMISSED //

SD/-
P.R. RAMAN, JUDGE.

SD/-
V.K. MOHANAN, JUDGE.

27TH NOVEMBER, 2007.

// TRUE COPY //

P.S. TO JUDGE.

KNC/-

P.R. RAMAN & V. K. MOHANAN, JJ.

A.S. NO. 537 OF 2002

DATED THIS, THE 27TH DAY OF NOVEMBER, 2007.

J U D G M E N T

Raman, J.

Plaintiff is the appellant. The suit was one instituted by the plaintiff against the defendant Narayanan Bhaskaran for specific performance of an agreement and for other reliefs.

2. The agreement is produced in this case as Ext.A1 dated 30.5.1994. After filing the written statement, the defendant died during the pendency of the suit and his sister was impleaded in the suit as Additional Defendant No.2. She also died during the pendency of this appeal and hence her legal heirs are impleaded in this appeal.

3. It was the case of the plaintiff that based on Ext.A1 agreement, the original defendant agreed to sell the property in question for a total consideration of Rs.1,25,000/- in favour of the President of the Anchalummodu Unit of the Vyapari Vyavasai Ekopana Samithi. Though the plaintiff was willing to perform their part of the contract, the defendant failed to execute the sale deed and hence after issuing notice the suit was instituted. The defendant contended that there was a specific understanding

between the parties that the plaintiff should construct a Sreenarayana Gurudeva Mandiram in the southern side of the property over a half cent extent spending about an amount of Rs. 2 lakhs. So however, concrete terms regarding this was not incorporated in the agreement as a result of fraud played by the plaintiff. Even the defendant was prepared to execute the sale deed provided the plaintiff agreed to construct a Gurudeva Mandiram spending an amount of Rs.2 lakhs at least within six months from the date of registration of sale deed, provided a clause regarding this incorporated in the sale deed. Notice to that effect was also issued by way of Ext.A11. But still the plaintiff was not ready and willing to the offer made. The plaintiff, on the other hand, denied the contention of the defendant.

4. On the side of the plaintiff, Exts.A1 to A12 documents were marked. They also examined PWs 1 to 3. On the side of the defendant, Exts.B1 to B7 were marked and examined DWs 1 and 2. The court below, after analysing the evidence on record, found that the allegation of fraud as pleaded by the defendant is not true. So however, it was found that the agreement is vague and incomplete and on the facts and circumstances of the case, the discretionary relief cannot be granted in favour of the plaintiff. It further found that the plaintiff is entitled for a decree for return of the amount with interest at 12% per annum and the undertaking given to that

effect by the defendant was recorded; but dismissed the suit without passing a decree granting the alternate relief.

5. Learned counsel for the appellant would contend that the appellant/plaintiff is entitled in law for a specific relief as according to him, when the appellant/plaintiff was ready and willing to perform his part of the obligation and the failure was on the part of the defendant to execute the sale deed, even though it is a discretionary relief, unless there are valid reasons for declining the relief, normally, the court below ought to have granted the decree as sought for. In this connection, he also submitted that the agreement, no doubt, contain a clause regarding construction of a Gurudeva Mandiram. But even going by the reply notice sent by the defendant - Ext.A11, his own contention is that the Gurudeva Mandiram has to be constructed within six months after the execution of the sale deed and as such the construction of Gurudeva Mandiram is not a part of the consideration agreed upon nor was it agreed that the Gurudeva Mandiram will be constructed before execution of the sale deed. In the circumstances, what is material is only as to the terms to be performed by the appellant/plaintiff before the execution of the sale deed and in this case, he was ready and willing to pay the balance consideration and nothing further remains to be done on his part. Though a notice was served asking the respondent/defendant to appear before the Sub Registrar's Office he did

not turn up. It was in these circumstances, that the suit was instituted.

6. Per contra, the contention of the learned counsel for the respondent/defendant is that there cannot be any dispute that there was an obligation cast on the appellant/plaintiff to construct a Gurudeva Mandiram in a half cent of property situated on the southern side of the property in question. This is clearly mentioned in the agreement itself. He referred to the relevant portion of the agreement in this regard. It is true that the manner in which it should be constructed or the time within which it should be constructed as such is not mentioned in the agreement; but there was an understanding between the parties that a Gurudeva Mandiram should be constructed by spending an amount of Rs. 2 lakhs and the total consideration agreed upon was Rs.3,75,000/- of which cash consideration shown in the agreement is Rs. 1,75,000/-. Even though a reply notice was issued by the respondent/defendant, the appellant/plaintiff did not even mention about the construction of the Gurudeva Mandiram by them either in the plaint or even in the replication filed after the written statement of the defendant. According to him, there cannot be any doubt that there is an obligation cast on the appellant to construct the Gurudeva Mandiram. If the understanding is different from what is spelt out in Ext.A11, nothing prevented the appellant from saying so either in the plaint or in the replication. This itself would show that the appellant was not prepared to

construct the Gurudeva Mandiram at any point of time. The agreement contains a clause regarding the construction of Gurudeva Mandiram; but it is not clear regarding the details. On an overall consideration of the factual aspects of the case, this is a fit case where specific relief could not be granted and rightly declined by the court below. It is further contended by him that the real party who instituted the suit is a tenant who is occupying the building. In this regard, he pointed out that even during the pendency of the proceeding, an Interlocutory Application was filed by the appellant as I.A. 2515/1994 for stay of the eviction proceedings. In what manner it could have advanced the case of the appellant by staying those proceedings itself is a matter one could guess; namely that the appellant wanted to help the tenant and nothing further. Any way it is strongly denied by the appellant that all that was intended by seeking a stay was to maintain status quo and further the tenant in occupation was also a member of the appellant/plaintiff Samithi. However, those aspects of the matter, as contended by the parties, has no relevance in deciding this appeal.

7. The point that arises for consideration is as to whether, in the facts and circumstances of the case, the court below has exercised its discretion in a proper manner while declining to grant specific performance of the agreement.

8. It admits of no doubt that there is a recital contained in Ext.A1 itself obliging the appellant/plaintiff to construct a Gurudeva Mandiram in the southern portion of the property over an extent of half cent. Whether the cost of construction should be two lakhs or less and when the construction should be done are however matters on which the agreement is silent. When the respondent/defendant alleged that the cost of construction agreed upon was Rs. 2 lakhs and if it was otherwise, nothing prevented the appellant/plaintiff from saying so either in his notice or in his pleadings. The appellant, on the other hand, kept silent regarding his obligation to be performed in the matter of construction of Gurudeva Mandiram. Even though it is contended by the learned counsel for the appellant that Ext.A1 notice itself would suggest that construction need be made within six months from the date of registration of the sale deed, the appellant/plaintiff has not cared to do so nor is there anything to show their readiness to perform that obligation. At any rate, when there is a condition in the agreement regarding the construction of a Gurudeva Mandiram, the details of which, however, could not be gathered from the agreement and when the appellant/plaintiff has no case as to what is the amount agreed upon regarding the cost of construction, there is vagueness in this regard. Having due regard to the factual situation, when the court below has declined to grant specific performance of the agreement as sought for, this court cannot

say that the discretion has not been exercised properly. Hence the court below was justified in not granting the specific relief as sought for.

9. However, even after finding that the appellant is entitled for a decree for return of the amount along with interest, the court below has chosen to dismiss the suit in stead of granting the alternate relief. In the circumstances, we modify the decree passed by the court below and grant a decree for return of the advance amount of Rs. 12,000/- (Twelve thousand) along with interest at 12% per annum from the date of payment till realisation. The appeal is thus allowed in part.

10. The deposited amount, along with interest, if any, accrued thereon shall be returned to the appellant/plaintiff. Since the appellant/plaintiff has got a statutory charge on the advance amount paid as per the provisions of the Transfer of Property Act, it is made clear that the decreed amount is charged on the property.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-

P.R. RAMAN &
V.K. MOHANAN, JJ.
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27TH NOVEMBER, 2007.